

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
GTE CORPORATION,)
)
Transferor,) CC Docket No. 98-184
)
and)
)
BELL ATLANTIC CORPORATION,)
)
Transferee,)
)
For Consent to Transfer of Control.)

**JOINT OBJECTION OF BELL ATLANTIC CORPORATION AND GTE
CORPORATION TO DISCLOSURE OF STAMPED CONFIDENTIAL
DOCUMENTS**

The requests by Sprint and AT&T to give key employees who function in competitive decision-making roles access to Bell Atlantic's and GTE's most sensitive documents should be denied.

Under the terms of the Protective Order in this proceeding,¹ only "outside counsel of record and in-house counsel who are actively engaged in the conduct of this proceeding, providing that those in-house counsel seeking access are not involved in competitive decision-making," are permitted access to stamped confidential documents. Protective Order at ¶13. AT&T and Sprint have requested that several of their employees gain access to Bell Atlantic's most sensitive documents. It is apparent, however, that two Sprint

¹ GTE Corporation and Bell Atlantic Corporation, Application For Consent to Transfer Control, CC Dkt. No. 98-184, Order Adopting Protective Order, Exhibit A (rel. Nov. 19, 1998) ("Order Adopting Protective Order").

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employees and one AT&T attorney do not meet the requirements of the Protective Orders. Bell Atlantic and GTE therefore request that these employees be denied access to stamped confidential documents. In the alternative, these employees should be required to execute detailed affidavits describing their job responsibilities and establishing conclusively that they satisfy the requirements of the Protective Order.

Sprint

Both Leon Kestenbaum, "Vice President, Federal Regulatory Affairs," and Craig Dingwall, "Director, State Regulatory/East," are not permitted access to Bell Atlantic's and GTE's most sensitive documents under the terms of the Protective Order. It is obvious from their titles alone that they perform competitive decision-making roles and do not fit under the category of lawyers functioning in purely legal roles.² Indeed, neither are appropriately considered "counsel" within the meaning of ¶3 of the Protective Order.

Vice President, Federal Regulatory Affairs. Mr. Kestenbaum apparently does not function as an attorney, but is "Vice President, Federal Regulatory Affairs." The Protective Order only permits "counsel" access to documents. Protective Order at ¶3. On this basis alone Mr. Kestenbaum is barred from reviewing his competitors' most sensitive documents.

Furthermore, Mr. Kestenbaum performs a competitive decision-making role as the Commission applies the concept. The Protective Order bars access to in-house counsel

² The Protective Order does state that Bell Atlantic and GTE shall object to requests for access within three business days, and Sprint sent its letter January 5, 1999. Bell Atlantic and GTE inadvertently did not object within three business days. The underlying question of whether "access to Stamped Confidential Documents is permitted pursuant to paragraph 3," however, is not subject to the three-day period for objections but is an independent, threshold question. Protective Order ¶5. As a result, individuals who are categorically barred from access to confidential documents cannot improperly receive access based on a mere failure to object.

who advise and participate in “any or all of the client’s business decisions” (emphasis added). The Commission’s MCI/WorldCom Protective Order ruling interpreting the same language established a nearly un rebuttable presumption that anyone at a sufficiently high level of a company is involved in competitive decision-making and thus should not have access to these types of documents. The Commission effectively found in MCI/WorldCom that a particular title alone creates a presumption of importance, regardless of the actual function performed (“ . . . it is difficult to fathom that a “Senior Vice President” of a company does not participate in competitive decision-making.”) In the Matter of Application of WorldCom and MCI for Transfer of Control, Order Ruling on Joint Objections, 13 FCC Rcd 13478 at ¶2 (1998). In this case, as head of the federal regulatory affairs office, Mr. Kestenbaum not only has an impressive title, but unlike the two Bell Atlantic attorneys disqualified in the MCI/WorldCom case, he is in charge of one of the most important non-legal functions within Sprint.

Indeed, Mr. Kestenbaum almost certainly has advised on or participated in the client’s important business decisions, since the ubiquity of regulations in the telecommunications industry ensures that the Vice President/Federal Regulatory Affairs will play an important role in everything from working with management to establish corporate strategy to setting prices. Mr. Kestenbaum’s advice on the prospects for interLATA relief under Section 271, for example, and the effect of large-scale entry by Sprint into the local exchange market on those prospects, helps dictate the timing, scale and scope of Sprint’s decisions to enter such markets.

At the very least, Mr. Kestenbaum must submit an affidavit explaining why, notwithstanding his crucial position in the company, he should be permitted access to these

highly confidential documents of his competitors. Consistent with the MCI/WorldCom ruling and the Protective Order in this case, Mr. Kestenbaum's affidavit would have to relate in detail his job function, his responsibilities, the matters he has worked on, and proof that he does not advise or participate in any of the client's business decisions.

Director, State Regulatory/East. Mr. Dingwall's very application for access to these documents raises serious questions about Sprint's commitment to abide by the terms of the Commission's Protective Order. The Commission bars use of information provided under the Protective Order for any purpose other than for the Commission's review of this merger, "including business, governmental, commercial or other administrative, regulatory or judicial proceedings." Order Adopting Protective Order at ¶6. Bell Atlantic and GTE are aware of no legitimate reason why Mr. Dingwall should show up in a federal regulatory proceeding other than that, in direct violation of this Protective Order, he intends to use the information gained in this proceeding in the state regulatory proceedings which he oversees. That alone disqualifies him.

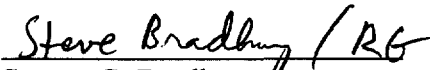
In addition, like Mr. Kestenbaum, Mr. Dingwall in his capacity as leader of a crucial element of Sprint's regulatory strategy is almost certainly involved in competitive decision-making as the Commission applies the term. The head of state regulatory policy for the Eastern half of the United States is an important person in any heavily regulated company like Sprint, and presumptively is involved in important business decisions such as the timing and scale of Sprint's entry into the local exchange market. Furthermore, it is indisputable that Mr. Dingwall does not function solely as a lawyer working on legal issues.

AT&T.

Bell Atlantic and GTE object to Protective Order access for Aryeh Freidman, a senior attorney who is likely to be involved in competitive decision-making for AT&T. AT&T does not divulge in its application what this attorney actually does, and in the absence of such disclosure it must be presumed that a senior attorney is engaged in competitive decision-making. In MCI/WorldCom, for example, the Commission found that a GTE employee with the title "antitrust counsel" (C. Daniel Ward) presumptively was engaged in competitive decision-making unless and until he proved he was not. MCI/WorldCom Order ¶5 ("Because WorldCom and MCI claim that these in-house counsel are actively engaged in competitive decision-making for GTE and GTE does not refute this claim, we agree with WorldCom and MCI that these two attorneys should be denied access to the confidential information.") Mr. Freidman can of course file an affidavit explaining that he does not advise on or participate in any competitive decision-making at AT&T; absent a compelling showing in such an affidavit, however, his application for access to documents must be denied.

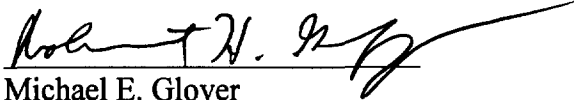
Respectfully submitted,

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January 25, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 1999, copies of the foregoing "Joint Objection of Bell Atlantic Corporation and GTE Corporation to Disclosure of Stamped Confidential Documents" were sent by first class mail, postage prepaid, to the parties on the attached list.

A handwritten signature in black ink, appearing to read "Jennifer L. Hoh", written over a horizontal line.

Jennifer L. Hoh

* Via hand delivery.

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